

# I N D E X.

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## A

### ACTION.

1. *Assgment—Interest—Contract.*—The interest due and to become due by an insurance company to a subscriber to its guaranty fund is assignable, subject however to the equities existing between the parties.—*Sumrall v. Sun Mutual Ins. Co.*, 27.
2. *Negligence—Damages.*—No person can sustain an action for a wrong when he has himself consented or contributed to the act which occasioned his damage.—*Callahan v. Warne et als.*, 131.
3. *Release—Co-obligors—Bonds.*—The release of one of several co-obligors does not discharge the other parties to the contract.—*R. C. 1855*, p. 873, § 14.—*State to use, &c. v. Atherton et al.*, 209.
4. *Municipal Corporations—Negligence—Highways.*—Municipal corporations are bound to keep the streets and highways in a proper state of repair, free from obstructions, so that they will be reasonably safe for travel, and if they neglect so to do they will be liable for all injuries happening by reason of their negligence; and they cannot avoid this responsibility by arrangements with other parties.—*Blake v. City of St. Louis*, 569.

### ADMINISTRATION.

1. *Estoppel—Record—Judgment—Evidence.*—Parol evidence is not admissible in a collateral suit to contradict the records of the Probate Court, showing that the lands of an intestate had been sold to pay debts.—*Lamothe et ux. v. Lippott*, 142.
2. *Covenant—Heirs—Administrators.*—A., B. and C. having made partition among themselves of land which they held as tenants in common, made an agreement under seal, that in case of any suits being prosecuted by or against either of them involving the title under which they claimed, the expenses should be equally borne by the parties, and for the performance of this agreement they bound themselves, their heirs and personal representatives. After the death of all the parties, suits involving the title of their grantors were prosecuted by and against the heirs, and the administrator of C., who sued the heirs of B. for contribution. *Held*, that the

ADMINISTRATION (*Continued*).

covenant was personal, affecting only the acts of the parties themselves, and did not extend to the acts of the heirs in prosecuting or defending suits.—*Chambers' Adm'r v. Wright's Heirs*, 482.

3. *Lands—Heirs—Administrators*.—At the death of a party his lands descend to his heirs or devisees, and the personal representative takes no interest therein but a naked power to sell for the payment of debts. The possession of the land as well as the defence of the title belong to the heirs or devisees alone, and the administrator has nothing to do with it.—*Id.*
4. *Demands—Judgments—Land Liens*.—Under the provisions of the act of Administration, R. C. 1855, p. 151, art. 4, § 1, judgments which are liens upon the real estate of the deceased are to be paid out of the proceeds of the sales of the lands, if the estate be insolvent, in the order of the judgment liens, without any regard to the order of allowance or classification in the Probate Court. The intention of the act was to secure to the creditor the fruits of his lien, which he was precluded from following by the death of the debtor. The second subdivision of sec. 1, postponing claims not presented in the first year, does not apply to judgments which were liens upon land if the estate be insolvent.—*Kerr's Adm'r v. Wimer's Adm'r*, 544.
5. *Heirs—Assets*.—Where heirs are proceeded against on account of a debt of the ancestor, they are not liable *in solido*, but only *pro rata* on account of assets descended. An estate by descent renders the heir liable for the debts of the ancestor to the value of the property descended, and he holds the land subject to the payment of the ancestor's debts.—*Metcalf et al. v. Smith's Heirs*, 572.

## ASSIGNMENT.

See **BILLS AND NOTES. BONDS. CONTRACTS.**

## ATTACHMENTS.

1. *Landlord and Tenant—Personalty*.—In an attachment under the Landlord and Tenant Act, the intention of the tenant in removing personalty from the premises is immaterial; the proper question is, does the removal of the property endanger the rent of the landlord?—*Morris et al. v. Hammerle*, 489.
2. *Residence—Domicil*.—A party may have a residence in one State, while his family may dwell in another State.—*Exchange Bank v. Cooper*, 169.
3. *Garnishment—Fraudulent Conveyances—Interpleading*.—A party summoned as a garnishee, upon an allegation that he had executed his promissory notes to the defendant in the attachment suit, and that he had combined with said defendant in an attempt to defraud his creditors, cannot protect himself by showing that he had subsequently paid said notes to an assignee who was also a participant in the fraudulent acts of the defendant in the attachment. (See *ante* *Potter v. Stevens*, 229, and *Potter v. McDowell*, 31 Mo. 62.) To protect himself, the garnishee should have filed his bill requiring the holder of the notes and the plaintiff to interplead.—*Potter et als., v. Stevens, Garn., &c.*, 591.

See **FRAUDS AND FRAUDULENT CONVEYANCES. PRACTICE, CIVIL.**

## B

## BILLS AND NOTES.

1. *Equities—Notice—Agency.*—A party acquiring a note through an agent after its maturity, takes it subject to the equities then existing between the parties; and the principal is affected with notice of all the facts made known to his agent in the transaction.—*Livermore v. Blood et al.*, 48.
2. *Endorsements—Title.*—A party taking from the agent of the payee a note endorsed in blank, before maturity, in good faith, as a collateral security for debt of a third party, is not affected by the fraud of the agent in disposing of the note.—*Paulette v. Brown*, 52.
3. *Husband and Wife—Separate Estate.*—A note executed by a married woman is, as a contract, void, and she cannot be made personally liable therefor. The holding of land in fee by a married woman does not create a separate estate so as to make her liable upon a note signed by her.—*Bauer et ux. v. Bauer*, 61.
4. *Practice—Parties.*—The payee and holder of a note may institute suit thereupon in his own name, and it is no defence that he holds the note as trustee for a third party.—*Nicolay v. Fritschle*, 67.
5. *Consideration.*—A note given to procure the discharge of a criminal prosecution is without sufficient consideration to support the promise.—*Murphy v. Bottomeret al.*, 67.
6. *Contracts—Rebel Enemy.*—No cause of action can arise out of an illegal consideration. A note given within the rebel lines during the civil war, and founded upon a consideration of goods sold to be paid in Confederate notes, and Confederate notes lent, is founded upon an illegal consideration, and the courts will not permit any action to be sustained therefor.—*Peltz v. Long*, 532.
7. *Contract—Crimes—Sunday.*—A note becomes effectual when delivered to the holder, and although a note be signed upon Sunday, yet, if not delivered until a subsequent day, it will be valid.—*Fritsch v. Heislen et al.*, 555.
8. *Endorsers.*—An endorser for the accommodation of the maker, upon paying the amount due upon the note to the holder, re-acquires title and may sue the maker.—*S. C. 31 Mo. 580.*—*Fenn v. Dugdale, adm'r*, 63.

## BONDS.

*Blanks—Alterations—Levy.*—The alterations which will avoid a bond must be material; the mere correction of the mistake in the filling up of a name in the body of the bond is not a material alteration. A blank in a bond given to a sheriff upon a claim for property levied upon under execution may be filled up with a description of the property seized, the blank being intended for that purpose, and the authority of the parties will be presumed. Whether the alterations in a bond are material is a question of law for the court; but whether the alterations were in fact made, or whether blanks were filled, by authority, are questions of fact for a jury.—*State to use, &c. v. Dean et al.*, 464.

See OFFICERS. PRACTICE, CIVIL. DAMAGES, 2.

## BOATS AND VESSELS.

1. *Courts—Jurisdiction—Admiralty.*—Stores and supplies furnished to a steam-boat at the home port in this State do not give an admiralty or maritime lien so as to oust the jurisdiction of the courts of this State, and the remedy given by our statute may be enforced against the boat by name. See *post* Boylan et al. v. St. Bt. Victoria, Hogan et al. v. St. Bt. Minnie, and Connolly v. St. Bt. Bee.—Cavender et al. v. St. Bt. Fanny Barker, 235.
2. *Seamen's Wages—Stores and Supplies.*—A party claiming a lien upon a boat upon account of moneys advanced to pay for wages due, or stores or supplies, must show that the money was advanced with the understanding that it should be used specifically for the purchase of supplies, for which the statute gives a lien. See *post* Gibbons et al. v. St. Bt. Fanny Barker.—*Id.*
3. *Courts—Jurisdiction.*—A contract made at the home port of a boat or vessel with the master or owner for supplies furnished to such vessel, is a land contract made and completed within the body of a county, and the courts of this State have jurisdiction to enforce such contract against the boat or vessel by subjecting it to sale as provided by the statute—Gen. Stat. 1865, ch. 193. Such a contract is not within the exclusive jurisdiction of the admiralty.—Boylan et al. v. St. Bt. Victory, 244.
4. *Limitations—Accounts.*—Where it is specially agreed or impliedly understood between the parties that an account is to be kept open and continued as one account, the limitations will commence to run from the last item of the account.—*Id.*
5. *Evidence—Admissions.*—The admissions of an owner are admissible in evidence in a suit against the boat.—*Id.*
6. *Stevedores—Liens—Work and Services.*—Work and labor done, or services rendered, in unloading a boat or vessel in port, by persons not regularly employed on the vessel, do not create a lien upon the boat under our statute.—Gibbons et al. v. St. Bt. Fanny Barker, 253.
7. *Liens—Stores and Supplies.*—Moneys advanced to a boat to pay her debts or expenses generally do not constitute a lien under our statute; it must be shown that the moneys were specifically advanced for the purposes for which a lien is given.—*Id.*
8. *Practice—Amendments—Limitations.*—In a suit against a boat or vessel, the plaintiff cannot so amend his petition as to introduce a new cause of action, especially after the time of commencing suit upon the lien has expired. The statute relating to boats and vessels being in derogation of the common law, must be strictly construed.—*Id.*
9. *Waiver of Lien—Note—Practice.*—A party having a lien upon a boat and taking a note for the amount thereof, may prosecute a suit against the boat in his own name to the use of his assignee, if he have the note ready at the trial to be delivered up and cancelled.—Aiken et al. v. St. Bt. Fanny Barker, 257.
10. *Waiver of Lien—Note—Practice.*—The taking of a promissory note does not waive the lien given by the statute upon a boat or vessel, although the note may have been discounted in bank, if the note be delivered up at the

BOATS AND VESSELS (*Continued*).

- trial to be cancelled. See *Aiken et al. v. St. Bt. Fanny Barker*, ante p. 257.—*Morrison et al. v. St. Bt. Laura*, 260.
11. *Agency*.—The agent can bind the boat by his contracts in behalf of the owner.—*Id.*
12. *Courts—Jurisdiction—Admiralty*.—Where the cause of action by a mariner for wages, for services rendered on the boat, accrues beyond the territorial jurisdiction of this State, the contract is within the exclusive jurisdiction of the admiralty, and the mariner cannot maintain an action against the boat in our courts.—*Connelly v. St. Bt. Bee*, 263.
13. *Courts—Jurisdiction—Admiralty*.—A contract for work and labor done and materials furnished in repairing a vessel at her home port, is not a maritime contract, and may be enforced against the boat under the statutes of this State.—*Hogan et al. v. St. Bt. Minnie*, 264.
14. *Revenue—Corporations, Municipal and Foreign*.—Ferry boats owned by a corporation created by the laws of the State of Illinois, and running between the Illinois and Missouri shores, are subject to taxation in this State, and by municipal corporations, if the companies owning said boats have an office for the transaction of business in this State within the limits of such city or town. For the purposes of taxation, such foreign corporation having an office and doing business within this State is to be considered a resident.—*City of St. Louis v. Wiggins Ferry Co.*, 580.

## C

## CONSTITUTION.

1. *Crimes—Court of Criminal Correction*.—The provisions of Gen. Stat. 1865, p. 895, § 15, providing that in the county of St. Louis all misdemeanors shall be proceeded with by information in the Court of Criminal Correction, are not in conflict with the provisions of sec. 24, art. 1, of the Constitution; neither does the law organizing the court violate that provision of the Constitution forbidding the General Assembly from passing special laws.—*State v. Ebert*, 186.
2. *Quo Warranto—Ousting Ordinance*.—The provisions of the ordinance of the Convention adopted March 16, 1865, G. S. 1865, p. 47, commonly called the Ousting Ordinance, were within the powers of the Convention, and were constitutional.—See *Thomas v. Mead*, 36 Mo. 242; *State v. Bernoudy*, 36 Mo. 279.—*State ex rel. Conrad v. Bernoudy*, 192.

## CONTRACTS.

1. *Action—Assignment—Interest*.—The interest due and to become due by an insurance company to a subscriber to its guaranty fund is assignable, subject, however, to the equities existing between the parties.—*Sumrall v. Sun Mutual Ins. Co.*, 27.
2. *Agent—Sealed Instrument*.—An agent, to bind his principal by deed, must have authority under seal. Although an instrument purporting to be sealed may be invalid as a deed, it may be evidence of a contract between the parties.—*Shuetze et al. v. Bailey et als.*, 69.

CONTRACTS (*Continued*).

3. *Evidence—Ambiguity.*—Parol evidence is admissible to explain the latent ambiguities of an instrument and to aid in its interpretation.—*Id.*
4. *Agent—Authority.*—The authority of an agent may be shown by the subsequent ratification of his acts by the principal.—*Id.*
5. *Delivery and Acceptance of Goods.*—Where a party knowingly accepts of goods of an inferior quality delivered in pursuance of a contract, he cannot afterwards object to the quality of such goods.—*Stevens et al. v. Mackay et al.*, 224.
6. *Agency.*—If the agent be false to his trust, or wrong his principal, the latter has his remedy; but a party trusting him in good faith, within the scope of his authority, cannot suffer thereby.—*King v. Pearce*, 222.
7. *Evidence—Carrier.*—In a suit against a carrier for the non-delivery of a trunk shipped, testimony to show what were the contents of the trunk at the time it was packed, some weeks before its delivery to the carrier, is admissible, although the carrier can only be held responsible for the contents of the trunk at the time of its receipt.—*Sugg v. Memphis & St. Louis Packet Co.*, 442.
8. *Debt—Assignment—Novation.*—A. being indebted to B. and C. being indebted to A., it was agreed between A., B. and C. that C. should pay B. the amount he owed A., unless upon going to his office he should find that he had been summoned as a garnishee of A. After A. had left, C. requested B. to procure A.'s written order of payment. C. proceeded to his office and found that no process of garnishment had been served, but in half an hour after C. was summoned as garnishee of A., and half an hour after B. presented to C. the written order of A. Upon an interpleader by B. in the garnishment suit—*Held*, that, by the agreement between A., B. and C., C. became indebted to B., and that the debt to A. was discharged, subject only to the condition that the debt had not been attached, and, as the condition had been performed and the debt had not been attached, that the contract between the parties was complete and the liability of C. fixed as the debtor of B.; and that the request of C. that B. should procure A.'s written order, A. not being present did not affect the assignment of the debt, and that the subsequent service of the garnishment could not impair the rights of B.—*Edgell v. Tucker, Interpleader, &c.*, 523.
9. *Mechanic's Lien—Agent—Contractor.*—The contractor with the owner for the erection of the building, under the Mechanic's Lien Law, is so far the agent of the owner that he can bind the property by all contracts for materials and labor necessary to complete the building.—*Morrison v. Hancock et als.*, 561.
10. *Bailments—Carriers—Railroad Corporations.*—The amount of business ordinarily done by a railroad is the only proper measure of its obligation to furnish transportation: if, from any reason, there is a sudden influx of freight demanding transportation, the obligation will be met by shipping the freight in the order of time in which it is offered. The freight is to be shipped in the order of time in which it is offered at the particular station, and not with reference to the entire line of the road; but no one station should be fur-

CONTRACTS (*Continued*).

nished with means of transportation to the prejudice and injury of another. The cars should be distributed among the different stations in proportion to the business ordinarily done, so that all freight may be shipped in a reasonable time.—*Ballentine v. N. Mo. R.R. Co.*, 491.

11. *Bailments—Carriers—Railroad Corporations—Negligence.*—A carrier cannot be held liable for negligence if he be prevented from performing his duty by the act of God. A snow storm which blocks up a railroad to the extent that it hinders and delays the running of cars, is such an act.—*Id.*
12. *Bailments—Carriers—Negligence—Damages.*—Carriers are responsible for the natural, ordinary and proximate causes of their acts, but not for such as are remote and extraordinary. The delay occasioned to a plaintiff attempting to ship hogs, and the necessary expenses in feeding and taking care of the same, would be the natural and immediate consequence of the wrong done by the carrier in refusing to receive and ship the freight, but this cannot be said in reference to the loss occasioned either by the death or shrinkage in weight of the hogs, unless it appear that these effects were in some manner caused directly by the act of the carrier.—*Id.*
13. *Bailment—Agistment—Negligence—Practice—Trials.*—A bailee taking cattle to pasture and keep is not an insurer, and is only liable for losses occasioned by his own negligence. Where the petition alleged that cattle bailed to pasture were lost through the carelessness and negligence of the bailee, the burden of proof to show negligence is upon the plaintiff; and if that be not shown, the defendant may ask the court to instruct the jury that the plaintiff is not entitled to recover.—*McCarthy v. Wolfe*, 520.

See BILLS AND NOTES, 6, 7. PRINCIPAL AND AGENT. EQUITY. INSURANCE.

## CONVEYANCES.

1. *Contract—Description—Quantity—Consideration.*—Where land is sold at a given price per acre for the aggregate quantity contained in the tract, specified at a certain number of acres more or less, no provision being made for a survey to ascertain the precise quantity to fix the amount to be paid, the price and number of acres are to be taken as showing the amount to be paid.—*Sullivan v. Ferguson et als.*, 79.
2. *Recording—Practice—Fraud.*—Under the statute of Fraudulent Conveyances, R. C. 1855, p. 802, § 8, the recording of a mortgage or deed of trust of personal property imparts notice to all subsequent claimants of the title of the mortgagee, although possession do not accompany the deed. The acknowledgment and recording of the deed removes the presumption of fraud arising from the possession not accompanying the deed. The deed imparts notice from the time of its being filed for record. (R. C. 1855, p. 364, § 41.)—*Miller v. Whitson et al.*, 97.
3. *Evidence—Certified Copies.*—Certified copies of conveyances may be read in evidence under the statute, R. C. 1855, p. 365, § 46, when the original is not in the control or possession of the party, his agents or bailees—*Barton v. Murrain*, 27 Mo. 235. A deed in trust will be presumed to be in the

CONVEYANCES (*Continued*).

- possession of the trustees or their beneficiaries.—*Boyce's Trustees v. Moon-ey et al.*, 104.
4. *Revenue—Register's Deed—Lands and Land Titles.*—The deed of the Register is *prima facie* evidence of title in the purchaser at a tax sale only when the deed is duly acknowledged and recorded in conformity with the statute relating to conveyances—*Stierlein v. Daley et als.*, 37 Mo. 483, affirmed.—*Dalton v. Fenn et al.*, 109.
  5. *Revenue—Collector's Certificate—Lands and Land Titles.*—Under the revenue act of 1857, to make the collector's certificate of sale for taxes *prima facie* evidence of right of possession in the purchaser at the sale, the certificate must be executed, acknowledged and recorded in the same manner as a conveyance of land. After the two years limited for redemption have passed, the holder of the certificate may procure a deed, but he cannot defend his possession against a party showing a legal title upon the certificate merely.—*Id.*
  6. *Description—Evidence.*—Where a particular tract of land cannot be located by the calls for monuments, or for course and distance, the intent of the parties is not to fail if there be any other matter indicative of such intent.—*Schultz v. Lindell's Heirs*, 330.
  7. *Evidence—Notice—Records—Lands and Land Titles.*—Notice is either actual or constructive. It is actual when the purchaser knows of the existence of the adverse claim, or is conscious of having the means of knowledge, although he may not use them; it is constructive when the law presumes it. *Speck v. Riggin*, 405.
  8. *Equity—Substitution—Notice.*—A., without actual knowledge of an attachment, purchased land subject to the encumbrance of a deed of trust, which was paid out of the purchase money and released upon the record, the title having been reported upon as subject only to the encumbrance of the deed of trust. Under the judgment in the attachment suit the land was subsequently sold. *Held*, that A. had no equity, to have entry of satisfaction set aside, to be substituted in the place of the original *cestui que trust*, and to have the property sold to pay the amount originally secured by the deed of trust; and that he must be treated as a purchaser with full notice. *Wade v. Beldmeir et als.*, 486.

## CORPORATIONS.

1. *Bailments—Carriers—Railroads.*—The amount of business ordinarily done by a railroad is the only proper measure of its obligation to furnish transportation: if, from any reason, there is a sudden influx of freight demanding transportation, the obligation will be met merely by shipping the freight in the order of time in which it is offered. The freight is to be shipped in the order of time in which it is offered at the particular station, and not with reference to the entire line of the road; but no one station should be furnished with means of transportation to the prejudice and injury of another. The cars should be distributed among the different stations in proportion to the business ordinarily done, so that all freight may be shipped in a reasonable time.—*Ballentine v. North Mo. R.R. Co.*, 491.

CORPORATIONS (*Continued*).

2. *Charter—Amendments—Acceptance.*—The acceptance of a charter by the corporation, and the acceptance of amendments to an existing charter, may be proved by the acts of the officers and members of the corporation, from which the fact of acceptance may be inferred.—*Sumrall v. Sun Mut. Ins. Co.*, 27.
3. *Franchise—Execution Levy.*—The franchise of a corporation cannot be levied upon and sold under execution.—*Stewart v. Jones*, 140.
4. *Limitations—Accruting of Action—City of St. Louis.*—Under the provisions of the charter of the City of St. Louis (February 23, 1853), providing for the condemnation of property for streets and alleys, where the title to the land taken for a street was in dispute between parties, no cause of action accrued against the city for the damages assessed until the question of title was determined by a court of competent jurisdiction in favor of the claimant.—*Soulard v. City of St. Louis*, 144.
5. *Principal and Surety—By-laws.*—The negligence of the directors and cashier of a bank in failing to comply with the by-laws of the corporation in examining its affairs, counting its cash, &c., &c., will not discharge the sureties upon the bond of the teller, who has committed a breach of his obligations by applying the moneys of the bank to his own use.—*State v. use, &c. v. Atherton et al.*, 209.
6. *Railroads—Negligence.*—The peculiar character of the vehicles employed by street railroads running through the crowded thoroughfares of a city makes it incumbent upon every company to exercise care and diligence to avoid collisions and accidents; no other rule can be recognized as compatible with the safety and security of the public. But this rule does not dispense with the care and prudence required of all persons using the street in common with the railroad company.—*Liddy v. St. Louis R.R. Co.*, 506.
7. *Street Railroads—Municipal Corporations—Negligence.*—The ordinance of the City of St. Louis regulating the running of cars on the street railroads within the limits of the city, imposes certain duties on the companies, and the violation of such regulations shows negligence in the management of the cars on such roads.—*Id.*
8. *Action—Negligence—Highways.*—Municipal corporations are bound to keep the streets and highways in a proper state of repair, free from obstructions, so that they will be reasonably safe for travel, and if they neglect so to do they will be liable for all injuries happening by reason of their negligence; and they cannot avoid this responsibility by arrangements with other parties.—*Blake v. City of St. Louis*, 569.
9. *Revenue—Residence.*—A corporation is a resident subject or citizen of the State in which it is created, regardless of the residence of its members or stockholders; but although the corporation itself cannot migrate or go out of the State creating it, it may by its agents act beyond the bounds of the State in which it exists, and thus become liable in other States to service of process upon its agents, and its property locally situate in such States may be subjected to taxation.—*City of St. Louis v. Wiggins Ferry Co.*, 580.
10. *Revenue—Residence—Personal Property—Assessment.*—The personal property of a resident actually situated beyond the limits of this State, is without its

CORPORATIONS (*Continued*).

jurisdiction, and cannot be assessed for taxation in this State; but the property of a non-resident is taxable here if it be found situate within the local jurisdiction, whether in the hands of the owner or his agents.—*Id.*

11. *Revenue—Boats and Vessels.*—Ferry boats owned by a corporation created by the laws of the State of Illinois, and running between the Illinois and Missouri shores, are subject to taxation in this State, and by municipal corporations, if the companies owning said boats have an office for the transaction of business in this State within the limits of such city or town. For the purposes of taxation, such foreign corporation having an office and doing business within this State is to be considered a resident.—*Id.*
12. *Revenue—Special Tax—Lien.*—Under the charter and ordinances of the City of St. Louis, the lien of the special tax for the making and repairing of streets and alleys commences from the date of the assessment of the tax by the city engineer after the work is completed.—*Anderson v. Holland*, 600.

## COURTS.

1. *Constitution—Crimes—Court of Criminal Correction.*—The provisions of Gen. Stat. 1865, p. 895, § 15, providing that in the county of St. Louis all misdemeanors shall be proceeded with by information in the Court of Criminal Correction, are not in conflict with the provisions of sec. 24, art 1, of the Constitution; neither does the law organizing the court violate that provision of the Constitution forbidding the General Assembly from passing special laws.—*State v. Ebert*, 186.
2. *Boats and Vessels—Jurisdiction—Admiralty.*—Stores and supplies furnished to a steamboat at the home port in this State do not give an admiralty or maritime lien so as to oust the jurisdiction of the courts of this State, and the remedy given by our statute may be enforced against the boat by name. See *post* *Boylan et al. v. St. Bt. Victoria*; *Hogan et al. v. St. Bt. Minnie*, and *Connelly v. St. Bt. Bee*.—*Cavender et al. v. St. Bt. Fanny Barker*, 236.
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4. *Jurisdiction—Boats and Vessels—Admiralty.*—Where the cause of action by a mariner for wages, for services rendered on the boat, accrues beyond the territorial jurisdiction of this State, the contract is within the exclusive jurisdiction of the admiralty, and the mariner cannot maintain an action against the boat in our courts.—*Connelly v. St. Bt. Bee*, 263.
5. *Boats and Vessels—Jurisdiction—Admiralty.*—A contract for work and labor done and materials furnished in repairing a vessel at her home port, is not a maritime contract, and may be enforced against the boat under the statute of this State.—*Hogan et al. v. St. Bt. Minnie*, 264.

## COVENANT.

See ADMINISTRATION, 2.

## CRIMES.

*Gaming — Criminal Practice.*—In a prosecution under the act, Gen. Stat. ch. 206, § 18, it is a sufficient defence that the premises occupied by the gambling device, and in which gambling was carried on, were not in the actual possession or control of the defendant, but were occupied by another person under a lease from defendant.—*State v. Ebert*, 186.

## D

## DAMAGES.

1. *Evidence — Negligence — Action — Practice — Trials — Instructions.*—The existence of negligence is a fact to be proved, and for the jury to determine, when there is competent evidence tending to prove it; but the question, what facts and circumstances, being proved, amount to evidence of the existence of the main fact in issue, or tend to prove it, is a question of law. Where the evidence presented by plaintiff does not sustain the plaintiff's cause of action, it is the duty of the court so to instruct the jury.—*Callahan v. Warne et al.*, 131.
2. *Replevin Bond — Sheriff — Practice.*—A party who makes himself the principal in a replevin bond, although not the plaintiff in the suit, will be liable to have judgment entered against him as principal. A stranger taking the property out of the hands of the sheriff by an action for the delivery of personal property, will be liable, if he fail to show title, for the whole value of the property taken out.—*Frei v. Vogel*, 149.
3. *Action — Covenant — Landlord and Tenant.*—In an action of covenant by the lessee against the lessor for failing to build a sufficient wall in accordance with his covenant, the lessee can recover such damages only as are direct and immediate, but not remote, speculative or contingent damages, or such as might have been avoided by his own act. The proper measure of damages would be the cost of repairing or building the wall, and compensation for the use of the premises of which he was deprived while they were undergoing repairs.—*Fisher v. Goebel*, 475.
4. *Bailments — Carriers — Negligence.*—Carriers are responsible for the natural, ordinary and proximate causes of their acts, but not for such as are remote and extraordinary. The delay occasioned to a plaintiff attempting to ship hogs, and the necessary expenses in feeding and taking care of the same, would be the natural and immediate consequence of the wrong done by the carrier in refusing to receive and ship the freight, but this cannot be said in reference to the loss occasioned either by the death or shrinkage in weight of the hogs, unless it appear that these effects were in some manner caused directly by the act of the carrier.—*Ballentine v. North Mo. R.R. Co.*, 491.
5. *Practice — Replevin.*—If in an action for the delivery of personal property the verdict be for the defendant, the measure of damages will be the value of the property at the time of its taking under the writ, with legal interest thereon up to the time of trial.—*Miller v. Whitson et al.*, 97.

See FIXTURES.

## DOMICIL.

See ATTACHMENTS, 2.

## DOWER.

1. *Wills — Devise — Election.* — A widow may always refuse to take under a will as a devisee or legatee, and may fall back on her claim for statutory dower, but she cannot claim under the will and under the statute at the same time; she must make her election, and claim under the one and reject the other. The widow does not take under the will as a purchaser, so as to have the portion bequeathed and devised to her discharged from liability for payment of the debts of the testator, when the burden of the debts is imposed generally upon the whole of the estate.—Brant's Will, 266.
2. *Admeasurement — Annual Value.* — In assessing the annual value of the dower of the widow in land not susceptible of being admeasured, the value is to be determined from what may be the net annual product without the expenditure of money or labor after deducting all charges to which the land is subject, such as taxes, repairs, &c. See Clamorgan v. Rippey, 15 Mo. 331. —Reily v. Bates, 468.

## E

## EJECTMENT.

1. *Practice — Judgment — Execution — Error.* — Although the description of the land in a judgment in ejectment be so vague that the officer cannot execute the writ of possession, that will not be a ground for reversal of the judgment in the Supreme Court.—Snyder v. Raab, 166.
2. *Lands and Land Titles — School Lands — Entry — Sale and Patent — Confirmation — Outstanding Title.* — A party in possession of land under an entry, sale, and patent issued in 1826, may, against the claim of the St. Louis Public Schools under the acts of June 13, 1812, and January 27, 1831, set up as an outstanding title a claim and confirmation by virtue of the act of July 4, 1836. The confirmer, although by the terms of the act he cannot recover the land as against the patentee, still has a right to locate other lands in lieu of those sold, and his title is not absolutely void.—St. Louis Pub. Schools v. Walker et al., 383.
3. *Forcible Entry and Detainer — Possession — Tenants in Common.* — The possession of one tenant in common is the possession of all. Where two are in possession together, and one only is turned out, and the other still remains, his possession is for his co-tenant as well as himself. (Garrison v. Savignac, 25 Mo. 47.)—Bernecker v. Miller et al., 473.

See CONVEYANCES. LANDS AND LAND TITLES. EQUITY. PRACTICE, CIVIL.

## EQUITY.

1. *Insurance — Policy — Agreement — Mistake.* — A court of equity will reform a policy or other written contract, upon parol evidence, when the agreement really made between the parties has not, through accident or mistake, been correctly incorporated into the written instrument; but both the agreement and the mistake must be made out by the clearest evidence, according to the understanding of both parties as to what the contract was intended to

EQUITY (*Continued*).

- be. The court cannot supply an agreement that was never made.—*Tesson v. Atlantic Mut. Ins. Co.*, 33.
2. *Bills and Notes—Notice—Agency*.—A party acquiring a note through an agent after its maturity, takes it subject to the equities then existing between the parties; and the principal is affected with notice of all the facts made known to his agent in the transaction.—*Livermore v. Blood et al.*, 48.
3. *Bills and Notes—Endorsements—Title*.—A party taking from the agent of the payee a note endorsed in blank, before maturity, in good faith, as a collateral security for debt of a third party, is not affected by the fraud of the agent in disposing of the note.—*Paulette v. Brown*, 52.
4. *Agent—Factor—Trust*.—Where an agent acts for an agreed compensation, or where there is no contract for a reasonable compensation, he will not be allowed to retain profits incidentally made in the execution of his duty, although it may have the sanction of usage. Where a person is actually or constructively an agent, all profits made in the business, beyond his ordinary compensation, are for the benefit of his employers.—*Jacques et als. v. Edgell et al.*, 76.
5. *Sale—Mortgage—Fraud*.—Where the sale, under a deed of trust to secure payment of a debt, was procured by fraud by lulling the owner of the land into security by the promise of the creditor not to sell without first making demand, the court set aside the sale and granted permission to redeem. (See S. C., 35 Mo. 95.)—*Clarkson et als. v. Creely et al.*, 114.
6. *Lands and Land Titles—Confirmations—Patents—Claims*.—Under different confirmations under the laws of the United States, the first equities against the Government of which a court can take notice are the inceptive acts, such as filing claims, &c., required by the statutes providing for such confirmations. Prior to such acts, unconfirmed claims or inchoate titles present nothing but an equity addressed to the political power, of which courts cannot take cognizance. The decision of the Government is final as to the comparative merit of all such claims.—*Magwire v. Tyler et als.*, 406.
7. *Lands and Land Titles—Judgment—Estoppel—Error*.—A decree in chancery between the same parties, proceeding upon the same substantial facts and grounds of equity, is conclusive. M. brought his bill, claiming an equitable title to a part of a tract of land patented to L. upon the ground that the part claimed had been confirmed to him by the United States, and that the survey made for L. was erroneous. The facts were found, and decree rendered against M. Subsequently M. procured a survey and patent for the land and brought a new bill—*Held*, that the former decree was conclusive as to the equities between the parties.—*Id.*
8. *Substitution—Conveyances—Notice*.—A., without actual knowledge of an attachment, purchased land subject to the encumbrance of a deed of trust, which was paid out of the purchase money and released upon the record, the title having been reported upon as subject only to the encumbrance of the deed of trust. Under the judgment in the attachment suit the land was subsequently sold. *Held*, that A. had no equity, to have entry of satisfaction set aside, to be substituted in the place of the original *cestui que trust*, and to have the property sold to pay the amount originally secured by the

EQUITY (*Continued*).

deed of trust; and that he must be treated as a purchaser with full notice.  
—*Wade v. Beldmeir et als.*, 486.

9. *Practice—Action—Interpleader.*—One of two parties claiming property in the hands of a third party, cannot bring a suit of equity against the other claimant and the holder, to have the rights of the parties determined as upon a bill of interpleader. A bill of interpleader lies only when the party holding the property asserts no interest therein, and is threatened with suits by different persons claiming the same property.—*Hathaway v. Foy et al.*, 540.
10. *Notice—Lis pendens.*—A suit pending is not notice to a purchaser so as to affect and bind his interest until the writ is served after petition filed.—*Metcalf et al. v. Smith's Heirs*, 572.

## ERROR.

See JUDGMENT. PRACTICE, CIVIL.

## ESTOPPEL.

1. *Judgment—Record—Evidence.*—The record of a judgment, in a former suit between the same parties, to constitute an estoppel, must show that the same subject matter had been passed upon and adjudicated in that suit.—*Clemens v. Murphy*, 121.
2. *Judgments.*—The doctrine of the conclusiveness of judgments conduces to peace and repose, and it cannot be disturbed without unsettling rules of property and producing irreparable mischief.—*Speck v. Riffin*, 405.
3. *Lands and Land Titles—Judgment—Equity.*—A decree in chancery between the same parties, proceeding upon the same substantial facts and grounds of equity, is conclusive. M. brought his bill, claiming an equitable title to a part of a tract of land patented to L. upon the ground that the part claimed had been confirmed to him by the United States, and that the survey made for L. was erroneous. The facts were found, and decree rendered against M. Subsequently M. procured a survey and patent for the land and brought a new bill—*Held*, that the former decree was conclusive as to the equities between the parties.—*Magwire v. Tyler et als.*, 406.
4. *Landlord and Tenant.*—A landlord may by his acts be estopped from setting up a breach of the conditions of the lease and demanding a forfeiture.—*Garnhart v. Finney*, 449.
5. *Insurance—Double Insurance—Notice—Agent.*—The policy sued on contained a clause providing that if the insured should procure any other insurance, and should not with all reasonable diligence give notice to the company, and have the same endorsed on the policy or otherwise acknowledged in writing, that the policy should cease and be of no further effect. The application for insurance was made for \$10,000; the agent of the defendant stated that by its rules the company could take but \$5,000 on any one risk, and offered to procure the insurance for the remaining \$5,000; which he did the next day, and notified the defendant, which did not object. The premium was subsequently paid and the policy delivered. *Held*, that it was the duty of the company, upon being notified by its own agent of the addi-

ESTOPPEL (*Continued*).

tional insurance, to endorse the same upon the plaintiff's policy or to notify him of the refusal of the risk, and that, having failed so to do, it was estopped from setting up as a defence the failure to have such additional insurance endorsed upon the policy.—*Horwitz v. Equitable Mut. Ins. Co.*, 557.

## EVIDENCE.

1. *Experts—Insurance*.—A witness who has been many years an officer of an insurance company, and has become acquainted with the business of fire insurance, is competent to give his opinion as to the effect produced by the erection of additions to the buildings insured.—*Kern v. South St. Louis Mut. Ins. Co.*, 19.
2. *Witness—Practice—Contradiction*.—It is proper to instruct a jury, that if a witness has wilfully and knowingly sworn falsely to any material matter in the case, then the jury are authorized to discredit the whole of the testimony of said witness.—*Paulette v. Brown*, 52.
3. *Ambiguity*.—Parol evidence is admissible to explain the latent ambiguities of an instrument and to aid in its interpretation.—*Schultz et al. v. Bailey et als.*, 69.
4. *Agent—Authority*.—The authority of an agent may be shown by the subsequent ratification of his acts by the principal.—*Id.*
5. *Carrier*.—In a suit against a carrier for the non-delivery of a trunk shipped, testimony to show what was the contents of the trunk at the time it was packed, some weeks before its delivery to the carrier, is admissible, although the carrier can only be held responsible for the contents of the trunk at the time of its receipt.—*Sugg v. Memphis & St. Louis Packet Co.*, 442.
6. *Conveyances—Certified Copies*.—Certified copies of conveyances may be read in evidence under the statute, R. C. 1855, p. 365, § 46, when the original is not in the control or possession of the party, his agents or bailees.—*Barton v. Murrain*, 27 Mo. 235. A deed in trust will be presumed to be in the possession of the trustees or their beneficiaries.—*Boyce's Trustees v. Mooney et al.*, 104.
7. *Conveyances—Description*.—Where a particular tract of land cannot be located by the calls for monuments, or for course and distance, the intent of the parties is not to fail if there be any other matter indicative of such intent.—*Schultz v. Lindell's Heirs*, 330.
8. *Conveyances—Notice—Records—Lands and Land Titles*.—Notice is either actual or constructive. It is actual when the purchaser knows of the existence of the adverse claim, or is conscious of having the means of knowledge, although he may not use them; it is constructive when the law presumes it.—*Speck v. Riffin*, 405.
9. *Estoppel—Record—Judgment—Administration*.—Parol evidence is not admissible in a collateral suit to contradict the record of the Probate Court, showing that the lands of an intestate had been sold to pay debts.—*Lamothe et ux. v. Lippott*, 142.
10. *Res Gestæ*.—What the defendants said in relation to their having paid an account presented to them, is part of the *res gestæ* when testimony is given

EVIDENCE (*Continued*).

- of the presenting the account and of the defendants' refusal to pay.—*Webster et al. v. Canmann et al.*, 158.
11. *Practice—Depositions—Trials.*—Exceptions to questions and answers, made during the taking of a deposition, must be presented to the court and passed upon at the trial. The whole deposition cannot be excluded because part of the testimony is objectionable.—*Id.*
  12. *Boats and Vessels—Admissions.*—The admissions of an owner are admissible in evidence in a suit against the boat.—*Boylan v. St. Bt. Victory*, 244.
  13. *Lands and Land Titles—Confirmations—Surveys—Location.*—A confirmation under the act of Congress of June 13, 1812, to a lot, out-lot or common-field lot by virtue of inhabitation, cultivation or possession prior to the 20th December, 1803, supersedes any title under a French or Spanish concession subsequently confirmed by the act of July 4, 1836; but the surveys under the latter confirmation may be used as evidence to show the location and boundaries of the lot confirmed by the prior act.—*Schultz v. Lindell's Heirs*, 330.
  14. *Practice—Trials—Discretion.*—The Supreme Court will not review the discretion of the inferior court in admitting evidence out of its proper order.—*St. Louis Pub. Schools v. Risley's Heirs*, 356.
  15. *Hearsay—Public Rights.*—Tradition, reputation and hearsay are admissible to prove the extent, character and existence of public rights as regards the location and boundaries of things of a public nature, as of a highway, street, or road.—*Id.*
  16. *Tax Receipts—Hearsay—Limitations.*—Evidence as to the payment of taxes is admissible in suits for the possession of land for the purpose of showing adverse possession, or the extent and boundaries of the land possessed.—*Id.*
  17. *Practice—Deceased Witness.*—The testimony given by a deceased witness at a previous trial cannot be read from the bill of exceptions without laying the proper foundation for its introduction, by proving by the testimony of a witness competent to testify, the accuracy of the minutes of the testimony of the deceased witness; the substance of what the witness swore to must be proved like other hearsay evidence.—*Morris et al. v. Hammerle*, 489.
  18. *Mechanic's Lien—Contractor—Owner—Furnishing Materials.*—In an action under the Mechanic's Lien Law, to enforce a lien for materials furnished to the contractor with the owner of the building, it is not necessary for the plaintiff to show that the materials furnished were actually used in the construction of the building; it is sufficient that (in the absence of collusion and fraud) the materials were furnished for the purpose of being used in the building. The statements of the contractor are admissible in evidence to show the purposes for which the materials were purchased.—*Morrison v. Hancock et als.*, 561.

See PRACTICE, CIVIL. WITNESSES.

## EXECUTIONS.

1. *Practice—Party—Sheriff—St. Louis County.*—Under the provisions of the statute "concerning the duties of sheriff in St. Louis county," of March 3, 1855, and March 14, 1859, the beneficiary in a deed of trust of personal property may file his claim with the sheriff, and sue upon the bond taken. He is a party in interest under the statute. See R. C. 1865, ch. 160, secs. 28 & 29.—State to use, &c., v. McKellop et als., 184.
2. *Officer—Sheriff—Fees.*—Under the statute relating to fees, R. C. 1855, p. 768-9, § 13, the sheriff is only entitled to half commissions when he receives the money without making a levy, or when he makes a levy and the money is paid to the sheriff or the party entitled without a sale.—Gaty v. Vogel, 553.

## F

## FIXTURES.

1. *Vendor and Vendee—Lands and Land Titles—Organ.*—Lamps, chandeliers, candelabra, sconces, brackets, and the various contrivances for lighting houses by means of candles, oil or other fluids, or gas, are not fixtures, and do not form part of the freehold so as to pass by a sale of the realty. Where in the erection of a church a recess was left to receive an organ, which was required to complete the design and finish of the building, the organ being attached to the floor and intended to be permanent—held, that the organ was to be considered as affixed to the freehold, and passed, as between vendor and vendee, by a sale of the realty.—Rogers et als. v. Crow et als., 91.
2. *Landlord and Tenant—Injunction—Damages.*—Where the landlord, before the expiration of the term, enjoins the tenant from removing the fixtures, the tenant will be allowed a reasonable time after the dissolution of the injunction within which to demand and remove the fixtures, although the term may have expired pending the injunction. The value of the fixtures is not to be assessed as damages upon dissolution of the injunction.—Bircher v. Parker, 118.

See LANDLORD AND TENANT. VENDORS AND PURCHASERS.

## FORCIBLE ENTRY AND DETAINER.

See EJECTMENT, 3.

## FRAUDULENT CONVEYANCES.

1. *Attachment—Garnishment—Interpleading.*—A party summoned as a garnishee, upon an allegation that he had executed his promissory notes to the defendant in the attachment suit, and that he had combined with said defendant in an attempt to defraud his creditors, cannot protect himself by showing that he had subsequently paid said notes to an assignee who was also a participant in the fraudulent acts of the defendant in the attachment. (See ante Potter v. Stevens, 229, and Potter v. McDowell, 31 Mo. 62.) To protect himself, the garnishee should have filed his bill requiring the holder of the notes and the plaintiff to interplead.—Potter et als., v. Stevens, Garn., &c., 591.
2. *Recording—Practice—Fraud.*—Under the statute of Fraudulent Conveyances, R. C. 1855, p. 802, § 8, the recording of a mortgage or deed of trust

FRAUDULENT CONVEYANCES (*Continued*).

- of personal property imparts notice to all subsequent claimants of the title of the mortgagee, although possession do not accompany the deed. The acknowledgment and recording of the deed removes the presumption of fraud arising from the possession not accompanying the deed. The deed imparts notice from the time of its being filed for record. (R. C. 1855, p. 364, § 41.)—*Miller v. Whitson et al.*, 97.
3. *Use of Grantors—Creditors—Practice.*—Where it is apparent upon the face of the deed of assignment or mortgage made by insolvent debtors that the deed was made for the purpose of hindering, delaying or defrauding creditors, it is the duty of the court to instruct the jury that the deed is void, and the question of the intent of the grantors should not in such case be left to the determination of the jury. And when upon the face of the deed of assignment it appeared that the parties supposed that there would be a large surplus after paying the debts described, and the whole property was protected from all forced sales or attachments and levies for the period of two years, during which period the management of the business was to be under the supervision of the grantors—*held*, that upon its face the deed appeared to be made for the purpose of hindering, delaying and defrauding creditors, and was void.—*Bigelow et als. v. Stringer et als.*, 195.
  4. *Purchasers—Grantee.*—A party accepting a conveyance of land made in fraud of creditors, for the purpose of assisting the debtor in his fraudulent acts, although he pay full value for the property, will be treated as a partaker in the fraud, and the conveyance will be held to be fraudulent and void.—*Potter v. McDowell*, 31 Mo. 62.—*Potter v. Stevens*, 229.
  5. *Purchaser without Notice—Mortgagee—Assignment of Debts.*—A mortgage is in equity considered as a security for the debt, and a transfer or assignment of the debt, or any part thereof, transfers the mortgage *pro tanto*. A mortgagee is a purchaser under the act relating to fraudulent conveyances.—*Id.*
  6. *Practice—Parties.*—A judgment was rendered against a defendant as a fraudulent grantee avoiding a deed made to defraud the creditors of the grantor, without making the holders of the notes secured by the grantee's mortgage or deed of trust parties to the suit. *Held*, that as the holders of the notes were not made parties, their interest could not be affected by the decree, and that, under the circumstances, the point not having been raised in the lower court, the court would not reverse the decree setting aside the fraudulent conveyance.—*Id.*
  7. *Practice.*—Conveyances held to have been fraudulent and void as a matter of fact.—*Allen v. Berry et al.*, 282.

## H

## HIGHWAYS.

See CORPORATIONS, 4, 6, 7.

*Action—Municipal Corporations—Negligence.*—Municipal corporations are bound to keep the streets and highways in a proper state of repair, free from obstructions, so that they will be reasonably safe for travel, and if they neglect so to do they will be liable for all injuries happening by reason of their

**HIGHWAYS (Continued).**

negligence ; and they cannot avoid this responsibility by arrangements with other parties.—*Blake v. City of St. Louis*, 569.

**HUSBAND AND WIFE.**

*Bills and Notes—Separate Estate.*—A note executed by a married woman is, as a contract, void, and she cannot be made personally liable therefor. The holding of land in fee by a married woman does not create a separate estate so as to make her liable upon a note signed by her.—*Bauer et ux. v. Bauer*, 61.

**I****INFANCY.**

See LIMITATIONS.

**INJUNCTION.**

See FIXTURES. PRACTICE, CIVIL.

**INSURANCE.**

1. *Policy—Representation—Interest—Title.*—A fire insurance policy contained a clause to the effect, "that if the interest in the property to be insured be a leasehold, trustee, mortgagee or reversionary interest, or other interest not absolute, it must be so represented to the company and expressed in the policy in writing; otherwise the insurance shall be void." The plaintiffs insured the property as owners; their title was a purchase at a sale under the foreclosure of a mortgage in the State of Illinois, by the laws of which the mortgagor had fifteen months after sale within which to redeem; before the execution of the deed to the plaintiffs the property insured was destroyed by fire, and subsequently the plaintiffs received a deed to the property. *Held*, that the terms of the policy referred not to the nature of the title, whether legal or equitable, but to the nature of the ownership of the property; and further, that the plaintiffs having subsequently acquired the legal title by the deed, the legal title should relate back and take effect from the inception of the equitable title by the purchase at the sale under the foreclosure, so that the plaintiffs at the time the policy was issued were the owners of the property, holding the legal title in fee.—*Gaylord et al. v. Lamar Fire Ins. Co.*, 13.
2. *Policy—Risk.*—When the alterations and additions to a building materially increase the risk, so that the insurer would be entitled to a higher rate of premium, the policy will be treated as absolutely void if the insured fail to give the notice required.—*Kern v. South St. Louis Mut. Ins. Co.*, 19.
3. *Policy—Equity—Agreement—Mistake.*—A court of equity will reform a policy or other written contract, upon parol evidence, when the agreement really made between the parties has not, through accident or mistake, been correctly incorporated into the written instrument; but both the agreement and the mistake must be made out by the clearest evidence, according to the understanding of both parties as to what the contract was intended to be. The court cannot supply an agreement that was never made.—*Tesson v. Atlantic Mut. Ins. Co.*, 33.

INSURANCE (*Continued*).

4. *Policy—Description—Warranty.*—If there be such a variance in the description in the policy as will amount to a breach of warranty in any material respect, the policy will be void, although the insured or his agent intended to effect an insurance on the property by whatever description might be correct. Whether the description in the policy covers or fairly describes the property intended to be insured, is a matter of fact for a jury to determine, and the terms of the policy are to be reasonably construed with reference to the whole subject matter.—*Id.*
5. *Charter—Policy—Risk.*—The charter of an insurance company, which was printed on and made part of the policy, provided that the insurance should be void if any alteration were afterwards made in the building insured, or if any other building should be erected or placed contiguous thereto, whereby it might be exposed to greater risk or hazard than it was when insured, unless done with the consent of the directors. In a suit upon the policy, *held*, that the burden of proof was upon the company to show a violation of the terms of the policy; and that it was properly left to the jury to determine whether any contiguous buildings had been erected so as to increase the risk that had been taken.—*Ritter et al. v. Sun Mut. Ins. Co.*, 40.
6. *Double Insurance—Notice—Estoppel—Agent.*—The policy sued on contained a clause providing that if the insured should procure any other insurance, and should not with all reasonable diligence give notice to the company, and have the same endorsed on the policy or otherwise acknowledged in writing, that the policy should cease and be of no further effect. The application for insurance was made for \$10,000; the agent of the defendant stated that by its rules the company could take but \$5,000 on any one risk, and offered to procure the insurance for the remaining \$5,000; which he did the next day, and notified the defendant, which did not object. The premium was subsequently paid and the policy delivered. *Held*, that it was the duty of the company, upon being notified by its own agent of the additional insurance, to endorse the same upon the plaintiff's policy or to notify him of the refusal of the risk, and that, having failed so to do, it was estopped from setting up as a defence the failure to have such additional insurance endorsed upon the policy.—*Horwitz v. Equitable Mut. Ins. Co.*, 557.
7. *Policy—Premium.*—A policy was sent to the assured with a note for the premium to be signed by the assured and endorsed by a responsible endorser; it being understood that until the note was returned the policy did not take effect. *Held*, that the execution of the note was a condition precedent to the taking effect of the policy; and that the parties to whom the sum insured was payable in case of loss, could have no greater right than the party under whom they claimed.—*Bidwell et al. v. St. Louis Floating Dock & Ins. Co.*, 42.

## J

## JUDGMENTS.

See ESTOPPEL, 3. ADMINISTRATION, 1, 4.

## JURISDICTION.

See BOATS AND VESSELS, 1, 3, 6, 12, 13, 14. CONSTITUTION, 1. CORPORATIONS, 9, 10. EQUITY, 9. COURTS.

## JUSTICES' COURTS.

*Filing Transcripts—Practice.*—When the transcript of a justice's judgment is filed in the office of the clerk of the Circuit Court, the court acquires jurisdiction of the case, and may, on cause shown, set aside or modify the judgment.—R. C. 1855, p. 961, § 19.—Bauer et ux. v. Bauer, 61.

## L

## LANDLORD AND TENANT.

1. *Injunction—Damages—Fixtures.*—Where the landlord, before the expiration of the term, enjoins the tenant from removing the fixtures, the tenant will be allowed a reasonable time after the dissolution of the injunction within which to demand and remove the fixtures, although the term may have expired pending the injunction. The value of the fixtures is not to be assessed as damages upon dissolution of the injunction.—Bircher v. Parker, 118.
2. *Damages—Covenant.*—In an action of covenant by the lessee against the lessor for failing to build a sufficient wall in accordance with his covenant, the lessee can recover such damages only as are direct and immediate, but not remote, speculative or contingent damages, or such as might have been avoided by his own act. The proper measure of damages would be the cost of repairing or building the wall, and compensation for the use of the premises of which he was deprived while they were undergoing repairs.—Fisher v. Goebel, 475.
3. *Improvements.*—It is not enough for the tenant to offer to fulfil the covenants of his lease so as to obtain permission from his landlord to remove the improvements he has erected upon the demised premises. He must first fulfil his covenants, and then he may have the legal right to remove his improvements without any permission.—Clemens v. Murphy, 121.
4. *Assignee—Possession.*—The assignee of the landlord by deed may recover, under a landlord's warrant, possession of the premises demised upon making demand of the rent due and exhibiting to the tenant in possession the deed under which he claims title.—R. C. 1855, p. 1018.—Fanning et als. v. Voelker, 129.
5. *Waiver of Forfeiture—Rents—Renewal of Lease.*—The acceptance of rent by the landlord after full notice or knowledge of the breach of condition for which a forfeiture might have been demanded, is a waiver of the forfeiture, which cannot afterwards be asserted. To show a waiver and the determination of the landlord to disclaim the reversion and continue the lease, slight acts are sufficient, and any recognition of a tenancy as subsisting after the right of entry has accrued and the lessor has notice of the forfeiture will have the effect of a waiver. Where an estate in land has become subject to forfeiture by non-performance of conditions at the day, the forfeiture will be waived by accepting performance at a subsequent day, and the acceptance of the performance of a new and substituted agreement will have the same effect. A landlord having waived his right to declare a forfeiture, cannot afterwards refuse to comply with his covenants for a renewal of the lease.—Garnhart v. Finney, 449.

LANDLORD AND TENANT (*Continued*).

6. *Estoppel*.—A landlord may by his acts be estopped from setting up a breach of the conditions of the lease and demanding a forfeiture.—*Garnhart v. Finney*, 449.
7. *Attachment*.—In an attachment under the Landlord and Tenant Act, the intention of the tenant in removing personalty from the premises is immaterial; the proper question is, does the removal of the property endanger the rent of the landlord?—*Morris et al. v. Hammerle*, 489.

## LANDS AND LAND TITLES.

See CONVEYANCES. EJECTMENT. EQUITY.

1. *Revenue—Register's Deed*.—The deed of the Register is *prima facie* evidence of title in the purchaser at a tax sale only when the deed is duly acknowledged and recorded in conformity with the statute relating to conveyances.—*Stierlein v. Daley et als.*, 37 Mo. 483, affirmed.—*Dalton v. Fenn et al.*, 109.
2. *Revenue—Collector's Certificate*.—Under the revenue act of 1857, to make the collector's certificate of sale for taxes *prima facie* evidence of right of possession in the purchaser at the sale, the certificate must be executed, acknowledged and recorded in the same manner as a conveyance of land. After the two years limited for redemption have passed, the holder of the certificate may procure a deed, but he cannot defend his possession against a party showing a legal title upon the certificate merely.—*Id.*
3. *Description—Evidence*.—Where a particular tract of land cannot be located by the calls for monuments, or for course and distance, the intent of the parties is not to fail if there be any other matter indicative of such intent.—*Schultz v. Lindell's Heirs*, 330.
4. *Limitations—Exceptions—Infancy*.—By the act of limitations, R. C. 1825, p. 510, a party within the exceptions of the statute at the time the right of entry accrued, has twenty years after removal of his disability within which to bring his action, and a purchaser under an administrator's sale takes the position of the heir.—*Id.*
5. *Accessions—Riparian Rights*.—A lot in a town or village may be entitled to the riparian right of accretions, the right turning upon the question whether or no the lot had a front upon the river. See *Jones v. Soulard*, 24 How. 51; *Smith v. Pub. Schools*, 30 Mo. 301; *LeBeau v. Gavin*, 37 Mo. 556.—*St. Louis Pub. Schools v. Risley's Heirs*, 356.
6. *Tax Receipts—Hearsay—Limitations*.—Evidence as to the payment of taxes is admissible in suits for the possession of land for the purpose of showing adverse possession, or the extent and boundaries of the land possessed.—*Id.*
7. *Confirmations—Public Officers—Surveyor*.—The act of Congress of June 13, 1812, was by its terms a direct grant of lands to all persons who could show that they came within the provisions of the first section, and no public officer could in any way impair that right by any subsequent action.—*St. Louis Pub. Schools v. Schoenthaler's Heirs*, 372.
8. *Reservation—Confirmations—School Lands—Patents*.—An inchoate claim to land duly located and presented to the Board of Commissioners under

LANDS AND LAND TITLES (*Continued*).

the acts of Congress of 1805 and 1807, and afterwards confirmed by the act of July 4, 1836, was excepted out of the reservation made for schools by the act of Congress of June 13, 1812, and was not granted by the act of June 27, 1831. After the claim has been surveyed under the confirmation, the Surveyor-General cannot survey and set apart the same land to the use of schools.—*St. Louis Pub. Schools v. Walker et al.*, 383.

9. *Confirmations—Patents—Relation.*—As between the parties, a confirmation by the act of July 4, 1836, relates back to the date of the filing of the claim with the first Board of Commissioners, where the claim had a definite location; but where land confirmed by the act of July 4, 1836, had been previously sold and patented by the United States, as between the patentee and the confirmee the confirmation has no relation backward.—*Id.*
10. *School Lands—Entry—Sale and Patent—Ejectment—Outstanding Title.*—A party in possession of land under an entry, sale, and patent issued in 1826, may, against the claim of the St. Louis Public Schools under the acts of June 13, 1812, and January 27, 1831, set up as an outstanding title a claim and confirmation by virtue of the act of July 4, 1836. The confirmee, although by the terms of the act he cannot recover the land as against the patentee, still has a right to locate other lands in lieu of those sold, and his title is not absolutely void.—*St. Louis Pub. Schools v. Walker et al.*, 383.
11. *Patents—Confirmations—Relation.*—Where two patents for the same land are issued by the United States, the elder patent conveys the absolute title, and if nothing more appear the junior patent is void. Where patents are issued upon confirmations by the Government, the legal title by relation takes effect from the first act in the inception of the title, which under confirmations of the old Board of Commissioners was the filing of the claim and papers in support thereof with the clerk; and where a confirmation was made upon a claim not filed by the claimant, the patent can relate back only to the date of the judgment of confirmation.—*Magwire v. Tyler et als.*, 406.
12. *Board of Commissioners—Jurisdiction—Confirmations.*—The Boards of Commissioners acting under the authority of the act of Mar. 2, 1805, and Mar. 3, 1807, had no jurisdiction to confirm lands to any person unless he filed his claim and made proof of title as required by the statutes, and a confirmation made without such claim and proofs is void.—*Id.*
13. *Confirmations—Patents—Practice.*—Under different confirmations under the laws of the United States, the first equities against the Government of which a court can take notice are the inceptive acts, such as filing claims, &c., required by the statutes providing for such confirmations. Prior to such acts, unconfirmed claims or inchoate titles present nothing but an equity addressed to the political power, of which courts cannot take cognizance. The decision of the Government is final as to the comparative merit of all such claims.—*Magwire v. Tyler et als.*, 406.
14. *Judgment—Estoppel—Error.*—A decree in chancery between the same parties, proceeding upon the same substantial facts and grounds of equity, is conclusive. M. brought his bill, claiming an equitable title to a part of a tract of land patented to L. upon the ground that the part claimed had been confirmed to him by the United States, and that the survey made for

LANDS AND LAND TITLES (*Continued*).

- L. was erroneous. The facts were found, and decree rendered against M. Subsequently M. procured a survey and patent for the land and brought a new bill—*Held*, that the former decree was conclusive as to the equities between the parties.—*Id.*
15. *Heirs—Administrators*.—At the death of a party his lands descend to his heirs or devisees, and the personal representative takes no interest therein but a naked power to sell for the payment of debts. The possession of the land as well as the defence of the title belong to the heirs or devisees alone, and the administrator has nothing to do with it.—*Chambers' Adm'r v. Wright's Heirs*, 432.
16. *Confirmations—Surveys—Evidence*.—A confirmation under the act of Congress of June 18th, 1812, to a lot, out-lot or common field lot by virtue of inhabitation, cultivation or possession prior to the 20th of December, 1803, supersedes any title under a French or Spanish concession subsequently confirmed by the act of July 4, 1836; but the surveys under the latter confirmation may be used as evidence to show the location and boundaries of the lot confirmed by the prior act.—*Schultz v. Lindell's Heirs*, 330.
17. *Confirmation—Evidence*.—A certificate of confirmation issued by the Recorder of land titles under the act of Congress of May 26, 1824, on proof made of cultivation, inhabitation and possession prior to December 20, 1803, is *prima facie* evidence of title under the United States.—*Bompart et als. v. Stumpff et al.*, 443.
18. *Limitations—Practice*.—It is for the jury to determine whether and at what time a continuous, open, notorious and actual adverse possession of land sued for commenced or was actually taken by the defendants.—*Id.*

## LIMITATIONS.

1. *Accruing of Action—City of St. Louis—Assessment*.—Under the provisions of the charter of the City of St. Louis (February 23, 1853), providing for the condemnation of property for streets and alleys, where the title to the land taken for a street was in dispute between parties, no cause of action accrued against the city for the damages assessed until the question of title was determined by a court of competent jurisdiction in favor of the claimant.—*Soulard v. City of St. Louis*, 144.
2. *Boats and Vessels—Accounts*.—Where it is specially agreed or impliedly understood between the parties that an account is to be kept open and continued as one account, the limitations will commence to run from the last item of the account.—*Boylan et al. v. St. Bt. Victory*, 244.
3. *Boats and Vessels—Practice—Amendments*.—In a suit against a boat or vessel, the plaintiff cannot so amend his petition as to introduce a new cause of action, especially after the time of commencing suit upon the lien has expired. The statute relating to boats and vessels being in derogation of the common law, must be strictly construed.—*Gibbons et al. v. St. Bt. Fanny Barker*, 253.
4. *Exceptions—Infancy*.—By the act of limitations, R. C. 1825, p. 510, a party within the exceptions of the statute at the time the right of entry accrued, has twenty years after removal of his disability within which to bring his

**LIMITATIONS** (*Continued*).

action, and a purchaser under an administrator's sale takes the position of the heir.—*Schultz v. Lindell's Heirs*, 330.

**MECHANICS' LIENS.**

1. *Practice—Set-off.*—In a suit to enforce a mechanic's lien by a subcontractor, the contractor is the principal debtor who is to defend the demand of the plaintiff, and may plead as against him a set-off or counter-claim.—*Wescott v. Bridwell et als.*, 146.
2. *Contractor—Owner—Furnishing Materials—Evidence.*—In an action under the Mechanics' Lien Law, to enforce a lien for materials furnished to the contractor with the owner of the building, it is not necessary for the plaintiff to show that the materials furnished were actually used in the construction of the building; it is sufficient that (in the absence of collusion and fraud) the materials were furnished for the purpose of being used in the building. The statements of the contractor are admissible in evidence to show the purposes for which the materials were purchased.—*Morrison v. Hancock et als.*, 561.
3. *Agent—Contractor.*—The contractor with the owner for the erection of the building, under the Mechanics' Lien Law, is so far the agent of the owner that he can bind the property by all contracts for materials and labor necessary to complete the building.—*Id.*

**M**

**MORTGAGE.**

1. *Equity—Fraud.*—Where the sale, under a deed of trust to secure payment of a debt, was procured by fraud, by lulling the owner of the land into security by the promise of the creditor not to sell without first making demand, the court set aside the sale and granted permission to redeem. (See S. C., 35 Mo. 95.)—*Clarkson et als. v. Creely et al.*, 114.
2. *Practice—Parties.*—A judgment was rendered against a defendant as a fraudulent grantee avoiding a deed made to defraud the creditors of the grantor, without making the holders of the notes secured by the grantee's mortgage or deed of trust parties to the suit. *Held*, that as the holders of the notes were not made parties, their interest could not be affected by the decree, and that, under the circumstances, the point not having been raised in the lower court, the court would not reverse the decree setting aside the fraudulent conveyance.—*Potter v. Stevens*, 229.

**N**

**NEGLIGENCE.**

1. *Action—Damages—Railroads.*—The court cannot single out an isolated fact, and instruct the jury as a matter of law that it amounts to negligence. Whether the action of the conductor of a railroad train in putting a party off the cars while moving very slowly, under all the circumstances of the case, amounted to negligence, was a question for the jury to determine. Whether the intoxication of the party injured contributed to the injury or not, was also a matter to be left to the jury.—*Meyer v. Pacific R.R.*, 151.

NEGLIGENCE (*Continued*).

2. *Bailments — Carriers — Railroad Corporations — Contract.*—A carrier cannot be held liable for negligence if he be prevented from performing his duty by the act of God. A snow storm which blocks up a railroad to the extent that it hinders and delays the running of cars, is such an act.—*Ballentine v. North Mo. R.R. Co.*, 491.
3. *Bailments — Carriers — Delay — Damages.*—Carriers are responsible for the natural, ordinary and proximate causes of their acts, but not for such as are remote and extraordinary. The delay occasioned to a plaintiff attempting to ship hogs, and the necessary expenses in feeding and taking care of the same, would be the natural and immediate consequence of the wrong done by the carrier in refusing to receive and ship the freight, but this cannot be said in reference to the loss occasioned either by the death or shrinkage in weight of the hogs, unless it appear that these effects were in some manner caused directly by the act of the carrier.—*Id.*
4. *Bailment — Agistment — Petition — Practice — Trials.*—A bailee taking cattle to pasture and keep is not an insurer, and is only liable for losses occasioned by his own negligence. Where the petition alleged that cattle bailed to pasture were lost through the carelessness and negligence of the bailee, the burden of proof to show negligence is upon the plaintiff; and if that be not shown, the defendant may ask the court to instruct the jury that the plaintiff is not entitled to recover.—*McCarthy v. Wolfe*, 520.
5. *Railroad Corporations.*—The peculiar character of the vehicles employed by street railroads running through the crowded thoroughfares of a city makes it incumbent upon every company to exercise care and diligence to avoid collisions and accidents; no other rule can be recognized as compatible with the safety and security of the public. But this rule does not dispense with the care and prudence required of all persons using the street in common with the railroad company.—*Liddy v. St. Louis R.R. Co.*, 506.
6. *Railroad Corporations — Municipal Corporations — Duties.*—The ordinance of the City of St. Louis regulating the running of cars on the street railroads within the limits of the city, imposes certain duties on the companies, and the violation of such regulations shows negligence in the management of the cars on such roads.—*Id.*
7. *Action — Municipal Corporations — Highways.*—Municipal corporations are bound to keep the streets and highways in a proper state of repair, free from obstructions, so that they will be reasonably safe for travel, and if they neglect so to do they will be liable for all injuries happening by reason of their negligence; and they cannot avoid this responsibility by arrangements with other parties.—*Blake v. City of St. Louis*, 569.
8. *Action — Damages.*—No person can sustain an action for a wrong when he has himself consented or contributed to the act which occasioned his damage.—*Callahan v. Warne et als.*, 131.

## O

## OFFICER.

1. *Sheriff — Fees — Executions.*—Under the statute relating to fees, R. C. 1855, pp. 768-9, § 13, the sheriff is only entitled to half commissions when he re-

OFFICER (*Continued*).

ceives the money without making a levy, or when he makes a levy and the money is paid to the sheriff or the party entitled without a sale.—*Gaty v. Vogel*, 553.

2. *Practice—Parties—Replevin—Bond—Sheriff.*—When the coroner in executing an order for the delivery of personal property fails to take a good and sufficient bond from the plaintiff in the action, the officer and his securities will be liable upon the official bond to the party injured by such neglect; and where the property is taken from the sheriff who had levied upon the same, the plaintiff in the execution has such an interest in the property that he may maintain the action.—*State to use, &c. v. Boisliniere et als.*, 566.

## P

## PARTITION.

*Practice—Parties.*—In a suit for partition of land, the trustee and *cestui que trust* in a deed conveying a part of the premises are properly made parties for the purpose of binding their interest although no relief be prayed against them. (*Alexander v. Warrance*, 17 Mo. 228, commented upon and explained. See *Metcalf et al. v. Smith's Heirs*, 572.)—*Reinhardt et als. v. Wen. deck et als.*, 577.

## PRINCIPAL AND AGENT.

1. *Contract—Sealed Instrument.*—An agent, to bind his principal by deed, must have authority under seal. Although an instrument purporting to be sealed may be invalid as a deed, it may be evidence of a contract between the parties.—*Shuetze et al. v. Bailey et als.*, 69.
2. *Authority.*—The authority of an agent may be shown by the subsequent ratification of his acts by the principal.—*Id.*
3. *Contract.*—If the agent be false to his trust, or wrong his principal, the latter has his remedy; but a party trusting him in good faith, within the scope of his authority, cannot suffer thereby.—*King v. Pearce*, 222.
4. *Mechanic's Lien—Owner—Contractor.*—The contractor with the owner for the erection of the building, under the Mechanics' Lien Law, is so far the agent of the owner that he can bind the property by all contracts for materials and labor necessary to complete the building.—*Morrison v. Hancock et als.*, 561.
5. *Boats and Vessels.*—The agent can bind the boat by his contracts in behalf of the owner.—*Morrison et al. v. St. Bt. Laura*, 260.
6. *Factor—Trust—Usage.*—Where an agent acts for an agreed compensation, or where there is no contract for a reasonable compensation, he will not be allowed to retain profits incidentally made in the execution of his duty, although it may have the sanction of usage. Where a person is actually or constructively an agent, all profits made in the business, beyond his ordinary compensation, are for the benefit of his employers.—*Jacques et als. v. Edgell et al.*, 76.

## PRACTICE, CIVIL.

## PARTIES.

1. *Action—Interpleader.*—One of the two parties claiming property in the hands of a third party, cannot bring a suit of equity against the other claimant and the holder, to have the rights of the parties determined as upon a bill of interpleader. A bill of interpleader lies only when the party holding the property asserts no interest therein, and is threatened with suits by different persons claiming the same property.—*Hathaway v. Foy et al.*, 540.
2. *Bills and Notes—Parties.*—The payee and holder of a note may institute suit thereupon in his own name, and it is no defence that he holds the note as trustee for a third party.—*Nicolay v. Fritschle*, 67.
3. *Party—Execution—St. Louis County.*—Under the provisions of the statute "concerning the duties of sheriff in St. Louis county," of March 3, 1855, and March 14, 1859, the beneficiary in a deed of trust of personal property may file his claim with the sheriff, and sue upon the bond taken. He is a party in interest under the statute. See R. C. 1865, ch. 165, secs. 28 & 29, —State to use, &c. v. McKellops et al., 184.
4. *Fraudulent Conveyance.*—A judgment was rendered against a defendant as a fraudulent grantee avoiding a deed made to defraud the creditors of the grantor, without making the holders of the notes secured by the grantee's mortgage or deed of trust parties to the suit. *Held*, that as the holders of the notes were not made parties, their interest could not be affected by the decree, and that, under the circumstances, the point not having been raised in the lower court, the court would not reverse the decree setting aside the fraudulent conveyance.—*Potter v. Stevens*, 229.
5. *Parties—Replevin—Bond—Officer—Sheriff.*—When the coroner in executing an order for the delivery of personal property fails to take a good and sufficient bond from the plaintiff in the action, the officer and his securities will be liable upon the official bond to the party injured by such neglect; and where the property is taken from the sheriff who had levied upon the same, the plaintiff in the execution has such an interest in the property that he may maintain the action.—State to use, &c., v. Boisliniere et als., 566.
6. *Parties—Partition.*—In a suit for partition of land, the trustee and *cestui que trust* in a deed conveying a part of the premises are properly made parties for the purpose of binding their interest although no relief be prayed against them. (*Alexander v. Warrance*, 17 Mo. 228, commented upon and explained. See *Metcalf et al. v. Smith's Heirs*, 572.)—*Reinhardt et als. v. Wendeck et als.*, 577.
7. *Boats and Vessels—Waiver of Lien—Note.*—A party having a lien upon a boat and taking a note for the amount thereof, may prosecute a suit against the boat in his own name to the use of his assignee, if he have the note ready at the trial to be delivered up and cancelled.—*Aiken et al. v. St. Bt. Fanny Barker*, 257.
8. *Release—Co-obligors—Bonds.*—The release of one of several co-obligors does not discharge the other parties to the contract.—R. C. 1855, p. 873, § 14.—State to use, &c. v. Atherton et al., 209.

PRACTICE, CIVIL (*Continued*).

PLEADINGS.

9. *Exhibits*.—No reference to papers which are mere exhibits in a cause can make the contents of such papers parts of the pleading.—*Kern v. South St. Louis Mut. Ins. Co.*, 19.
10. *Mechanics' Liens—Set off*.—In a suit to enforce a mechanic's lien by a subcontractor, the contractor is the principal debtor who is to defend the demand of the plaintiff, and may plead as against him a set-off or counterclaim.—*Wescott v. Bridwell et als.*, 146.
11. *Causes of Action*.—Where no legal cause of action against the defendants is set forth in the petition, the judgment will be arrested.—*Langford et als. v. Sanger et als.*, 160.
12. *Surplusage*.—Damages naturally follow the breach of a contract, and the setting forth of the specifications of the evidence is faulty and vicious pleading. A petition to recover damages for breaches of a contract, should set out the contract, and then assign the breaches thereof.—*Id.*
13. *Amendments—Limitations*.—In a suit against a boat or vessel, the plaintiff cannot so amend his petition as to introduce a new cause of action, especially after the time of commencing suit upon the lien has expired. The statute relating to boats and vessels being in derogation of the common law, must be strictly construed.—*Gibson et al. v. St. Bt. Fanny Barker*, 253.

TRIALS.

14. *Replevin—Damages*.—If in an action for the delivery of personal property the verdict be for the defendant, the measure of damages will be the value of the property at the time of its taking under the writ, with legal interest thereon up to the time of trial.—*Miller v. Whitson et al.*, 97.
15. *Damages—Negligence—Action—Instructions—Evidence*.—The existence of negligence is a fact to be proved, and for the jury to determine, when there is competent evidence tending to prove it; but the question, what facts and circumstances, being proved, amount to evidence of the existence of the main fact in issue, or tend to prove it, is a question of law. Where the evidence presented by plaintiff does not sustain the plaintiff's cause of action, it is the duty of the court so to instruct the jury.—*Callahan v. Warne et als.*, 131.
16. *Replevin Bond—Sheriff—Damages*.—A party who makes himself the principal in a replevin bond, although not the plaintiff in the suit, will be liable to have judgment entered against him as principal. A stranger taking the property out of the hands of the sheriff by an action for the delivery of personal property, will be liable, if he fail to show title, for the whole value of the property taken out.—*Frei v. Vogel*, 149.
17. *Supreme Court—Evidence*.—Where there is a total failure of evidence tending to prove the issue, the court may determine the whole case as a matter of law; but where there is presented legal evidence tending to prove the issue, the jury must determine what weight shall be attached thereto.—*Meyer v. Pacific R.R.*, 151.

PRACTICE, CIVIL—TRIALS (*Continued*).

18. *Instructions*.—Where the court refuses instructions as prayed, but gives them in a modified form, the party asking the instructions may treat them as refused, and save his exceptions.—*Id.*
19. *Action—Damages—Negligence*.—The court cannot single out an isolated fact, and instruct the jury as a matter of law that it amounts to negligence. Whether the action of the conductor of a railroad train in putting a party off the cars while moving very slowly, under all the circumstances of the case, amounted to negligence, was a question for the jury to determine. Whether the intoxication of the party injured contributed to the injury or not, was also a matter to be left to the jury.—*Meyer v. Pacific R.R.*, 151.
20. *Depositions*.—Exceptions to questions and answers, made during the taking of a deposition, must be presented to the court and passed upon at the trial. The whole deposition cannot be excluded because part of the testimony is objectionable.—*Webster et al. v. Canmann et al.*, 156.
21. *Instructions*.—To authorize the giving of instructions there must be evidence upon which they can be predicated.—*Ryan v. Spalding et als.*, 165.
22. *Witness—Striking out Answer*.—Under the provisions of the statute, R. C. 1855, p. 1577, § 4, if a party summoned as a witness fails to appear to testify, his answer or petition may be stricken out and judgment rendered accordingly.—*Snyder v. Raab*, 166.
23. *Instructions*.—The court should give or refuse the instructions asked by counsel in the language in which they are prayed. A modification made in an instruction asked is equivalent to a refusal of the instruction as prayed.—*Exchange Bank v. Cooper*, 169.
24. *Entries—Attorneys—Clerk*.—It is the duty of attorneys to see that the proper entries of the action of the court are made by the clerk. Where the attorneys had agreed that a motion for new trial should be continued until the next term, and so stated to the court, which did not dissent, and subsequently the motion was called up and overruled; and the plaintiff, at the next term, filing a motion, based upon affidavits setting forth the facts, to set aside the entry overruling the motion and to have the proper entry made,—the Supreme Court directed the entry to be set aside as irregular, on the ground that the hearing of the motion had been continued, and ordered that the entry of continuance should be entered *nunc pro tunc*, and that the motion should be regularly heard.—*Spalding v. Meier et als.*, 176.
25. *Non-suit—Proviso*.—Where the defendant answers and pleads a set-off and counter-claim, he cannot, if the plaintiff fail to appear at the trial, take a verdict and judgment for the amount of his set-off and counter-claim. The proper judgment is that of non-suit of the plaintiff, or a dismissal of his suit.—*Nordmanser v. Hitchcock*, 178.
26. *Fraudulent Conveyances—Use of Grantors—Creditors*.—Where it is apparent upon the face of the deed of assignment or mortgage made by insolvent debtors that the deed was made for the purpose of hindering, delaying or

PRACTICE, CIVIL—TRIALS (*Continued*).

defrauding creditors, it is the duty of the court to instruct the jury that the deed is void, and the question of the intent of the grantors should not in such case be left to the determination of the jury. And when upon the face of the deed of assignment it appeared that the parties supposed that there would be a large surplus after paying the debts described, and the whole property was protected from all forced sales or attachments and levies for the period of two years, during which period the management of the business was to be under the supervision of the grantors—*held*, that upon its face the deed appeared to be made for the purpose of hindering, delaying and defrauding creditors, and was void.—*Bigelow et als. v. Stringer et als.*, 195.

27. *Continuance*.—The ruling of the court in refusing to grant a motion for a continuance being entitled to every intendment in its favor, its judgment not revised.—*King v. Pearce*, 222.

28. *Exceptions*.—Where objections are made to the admission of evidence, the bill of exceptions must show the reasons upon which the objections were founded.—*St. Louis Pub. Schools v. Risley's Heirs*, 356.

29. *Discretion*.—The Supreme Court will not review the discretion of the inferior court in admitting evidence out of its proper order.—*St. Louis Pub. Schools v. Risley's Heirs*, 356.

30. *Evidence—Exceptions*.—If objection be made to the admissibility of a written contract sued upon, the reasons for the objection must be stated in the bill of exceptions.—*Harris v. Brevator*, 599.

NEW TRIALS.

31. *Newly discovered Evidence*.—An application for new trial upon the ground of newly discovered evidence must show that the party has used all due diligence, and that the evidence is competent, material, and not cumulative.—*Miller v. Whitson et al.*, 97.

32. *Neglect—Attorneys*.—The Supreme Court is never inclined to interfere with the discretion of the inferior courts in their action in refusing to grant new trials, unless a strong case is made out showing a palpable abuse of a sound discretion, and where the injustice complained of is not traceable to the negligence of the party. Where a cause is regularly docketed and set for trial, it is no excuse for the party who has suffered, that his attorney was absent, or did not attend to the suit.—*Nordmanser v. Hitchcock*, 178.

33. *Setting aside Non-suit—Mistake of Counsel*.—Non-suit set aside upon payment of costs, under the circumstances, it appearing that the counsel had given a mistaken construction to the statute and the decisions of the court thereupon.—*Boyce's Trustees v. Mooney et al.*, 104.

34. *Default—Negligence*.—To authorize the setting aside of a judgment on account of the want of defence at the trial, the defendant must show that all due diligence has been used by himself and his attorneys.—*Bosbyshell v. Summers et al.*, 172.

35. *Error*.—For error apparent upon the face of the record, the Supreme Court

PRACTICE, CIVIL (*Continued*).

## SUPREME COURT.

will reverse a judgment, although the party complaining of the judgment has failed to present his exceptions properly.—*Nordmanser v. Hitchcock*, 178.

36. *Judgment*.—The Supreme Court may affirm a judgment as to some of the parties, and reverse it as to others.—*Wescott v. Bridwell et als.*, 146.

37. *Trials—Jury*.—It is the province of the jury to decide upon the credibility and weight of testimony; and where evidence is presented legally tending to support the issues, the Supreme Court will not review the finding of the jury.—*Blumenthal v. Torini*, 159.

38. *Exceptions—Error*.—The Supreme Court will not review the judgment of the court below unless error appear of record, or exceptions be taken and preserved.—*Wenst v. Schroeder*, 602.

39. *Briefs*.—Appeal dismissed upon failure of appellant to file statement and brief.—*State to use, &c. v. Leutzinger et als.*, 603.

40. *Assignment of Errors—Briefs*.—Judgment affirmed, appellants failing to assign errors and file statement and brief.—*Cogswell et al. v. Randolph et als.*, 603.

41. *Verdict*.—Verdict for the right party.—*Garesché v. Deane*, 168.

## PRACTICE, CRIMINAL.

See CRIMES. COURTS.

## R

## REVENUE.

1. *Corporations, Foreign—Residence*.—A corporation is a resident subject or citizen of the State in which it is created, regardless of the residence of its members or stockholders; but although the corporation itself cannot migrate or go out of the State creating it, it may by its agents act beyond the bounds of the State in which it exists, and thus become liable in other States to service of process upon its agents, and its property locally situate in such States may be subjected to taxation.—*City of St. Louis v. Wiggins Ferry Co.*, 580.

2. *Residence—Personal Property—Assessment*.—The personal property of a resident actually situated beyond the limits of this State, is without its jurisdiction, and cannot be assessed for taxation in this State; but the property of a non-resident is taxable here if it be found situate within the local jurisdiction, whether in the hands of the owner or his agents.—*Id.*

3. *Corporations, Municipal and Foreign—Boats and Vessels*.—Ferry boats owned by a corporation created by the laws of the State of Illinois, and running between the Illinois and Missouri shores, are subject to taxation in this State, and by municipal corporations, if the companies owning said boats have an office for the transaction of business in this State within the limits of such city or town. For the purposes of taxation, such foreign corporation having an office and doing business within this State is to be considered a resident.—*Id.*

REVENUE (*Continued*).

4. *Municipal Corporations—Special Tax—Lien.*—Under the charter and ordinances of the City of St. Louis, the lien of the special tax for the making and repairing of streets and alleys commences from the date of the assessment of the tax by the city engineer after the work is completed.—*Anderson v. Holland*, 600.
5. *Conveyance—Register's Deed—Lands and Land Titles.*—The deed of the Register is *prima facie* evidence of title in the purchaser at a tax sale only when the deed is duly acknowledged and recorded in conformity with the statute relating to conveyances—*Stierlein v. Daley et als.*, 37 Mo. 483, affirmed.—*Dalton v. Fenn et al.*, 109.
6. *Conveyance—Collector's Certificate—Lands and Land Titles.*—Under the revenue act of 1857, to make the collector's certificate of sale for taxes *prima facie* evidence of right of possession in the purchaser at the sale, the certificate must be executed, acknowledged and recorded in the same manner as a conveyance of land. After the two years limited for redemption have passed, the holder of the certificate may procure a deed, but he cannot defend his possession against a party showing a legal title upon the certificate merely.—*Id.*

## S

## SECURITIES.

1. *Principal and Surety—Bonds—Damages.*—Where the principal in a bond, given to secure the faithful performance of his duties as a teller of a bank, had, previous to the execution of the bond, taken and appropriated to his own use moneys of the bank, and after the giving of the bond had applied moneys received to wrong accounts so as to cover up his defalcation—*held*, that the security was not liable for the defalcation committed before the execution of the bond; and that for the mere misapplication of the moneys subsequently received to wrong accounts, the damages could be only nominal.—*State to use, &c. v. Atherton et al.*, 209.
2. *Principal and Surety—Witness—Party.*—The principal in a bond, defendant in a suit against whom a judgment by default has been rendered, is a competent witness for his co-defendant, the surety in the bond.—*Id.*
3. *Principal and Surety—By-laws.*—The negligence of the directors and cashier of a bank in failing to comply with the by-laws of the corporation in examining its affairs, counting its cash, &c., &c., will not discharge the sureties upon the bond of the teller, who has committed a breach of his obligations by applying the moneys of the bank to his own use.—*State to use, &c. v. Atherton et al.*, 209.

## U

## USES AND TRUSTS.

See EQUITY, 4, 6, 7, 8.

## V

## VENDORS AND PURCHASERS.

1. *Lien—Waver.*—Where the vendor sells land and takes collateral security for the purchase money, he will be considered as waiving his lien upon the land conveyed.—*Sullivan v. Ferguson et als.*, 79.

VENDORS AND PURCHASERS (*Continued*).

2. *Fixtures—Lands and Land Titles.*—Lamps, chandeliers, candelabra, sconces, brackets, and the various contrivances for lighting houses by means of candles, oil or other fluids, or gas, are not fixtures, and do not form part of the freehold so as to pass by a sale of the realty. Where in the erection of a church a recess was left to receive an organ, which was required to complete the design and finish of the building, the organ being attached to the floor and intended to be permanent—*held*, that the organ was to be considered as affixed to the freehold, and passed, as between vendor and vendee, by a sale of the realty.—*Rogers et als. v. Crow et als.*, 91.

## W

## WILLS.

1. — *Legatees and Devisees—Marshalling Assets.*—The testator by his will directed his executors to pay off and discharge all his debts out of his estate as soon as could conveniently be done after his decease; he then bequeathed and devised his estate by specific legacies and devised to his wife and his children in nearly equal parts. The executors, from the rents of the realty, paid off the debts. Upon a bill to marshal assets, *held*, that as the testator had designated no specific fund from which the debts were to be paid, it was his intention that the devisees and legatees should contribute ratably to the abatement of the encumbrance, and that the whole burden of the debts could not be thrown upon the personal estate.—*Brant's Will*, 266.
2. *Dower—Devise—Election.*—A widow may always refuse to take under a will as a devisee or legatee, and may fall back on her claim for statutory dower, but she cannot claim under the will and under the statute at the same time; she must make her election, and claim under the one and reject the other. The widow does not take under the will as a purchaser, so as to have the portion bequeathed and devised to her discharged from liability for payment of the debts of the testator, when the burden of the debts is imposed generally upon the whole of the estate.—*Brant's Will*, 266.
3. *Construction of Will—Vesting—Mixed Estate consisting of Realty and Personality, Rules applicable to the former prevail—Case considered under both aspects—Trust—Discretionary Powers of Trustees—Discretion subsequent—Condition imposing extra-judicial duty on Court, not binding.*

The testator George Collier, Sen., by his will, after bequeathing various specific legacies, and making provision for his wife in lieu of dower, by the 17th clause devised and bequeathed the residue of his estate—which was very valuable and consisted principally of realty—to trustees (who were also appointed executors) in trust, for the uses and purposes therein specified. After prescribing the powers and duties of the trustees as to the management, improvement and disposition of the estate, and providing for the education, maintenance and advancement of his children, all of whom he names, he adds: "And when my said son Dwight shall attain the age of twenty-one years, I wish and require my said executors and trustees immediately to settle up my estate, and divide the same out among my said children as hereinafter mentioned, as far as it may be practicable." Each division or partition was to be submitted to the St. Louis Probate Court for

WILLS (*Continued*).

its approval, and if approved was to be binding and conclusive. He then continues: "In making partition as aforesaid, I wish and direct that each and all my said children shall receive equal portions or shares, as my affection and parental regard for them all know no distinction. But if, from Providential visitation or unforeseen casualty, or their own bad conduct—none of which contingencies or misfortunes I hope may ever intervene—my said trustees shall think it right and proper and safest and best, under all the circumstances, to make any difference or distinction among my said children or any of them, in making any of the divisions or partitions as above provided for, they are hereby vested with full power and authority to do so, as fully and to all intents and purposes as I myself could do if living at the time; such discrimination always, however, to be subject to the approval of the said Probate Court as aforesaid. But if all my children shall be worthy, no distinction or difference shall be made among them merely because one or some of them may be deemed by my said trustees more worthy than the others of them. The shares or portions of my estate which shall be thus set apart to my children shall be held by them in their own several rights under the full and perfect legal title—to them and to their heirs, executors, administrators, and assigns, forever." All the children named in the said clause survived the testator; but Henry, the youngest, (an infant), and George, Jr., an adult, died afterwards and before the said son Dwight had become of age. George, Jr., died testate, and leaving a widow but no children. *Held*, on petition of the trustees for the advice and directions of the court, that George and Henry took vested and transmissible estates under the will.

The law favors the vesting of estates; a devise or bequest therefore in favor of a person *in esse* simply (i. e. without any intimation of a desire to suspend or postpone its operation) confers an immediately vested interest.

Where words of futurity are introduced into the gift, the question arises, whether the expressions are inserted for the purpose of protracting the vesting, or point merely to the deferred possession or enjoyment.

This being a mixed gift or devise, the rules applicable to realty control.

The doctrine of *Boraston's case*, 3 Coke, 19, recognized and applied.

But no essential difference would be found to exist if the gift concerned personalty exclusively. Directions to pay, to transfer, to divide and partition, import a gift, unless restricted by some inconsistent limitation or condition. The constitution of this trust leads irresistibly to the inference that a gift was intended, and that the gift to the trustees was for the benefit of the children only.

The postponement of the division and partition being apparently more for the benefit and convenience of the estate than for any consideration personal to the devisees, could not prevent the vesting.

There is no limitation over of the respective interests, showing any purpose in the testator that the children should not receive their shares at all events. The consequence of holding that the devisees took no immediate interest would be, that, if any of them died before the period of division leaving children, those children would be wholly unprovided for. Parents are not generally actuated by such intentions, and, unless apparent and unmistakable, they will not be ascribed to them.

WILLS (*Continued*).

It is immaterial that the money is not to be paid or the property divided till a future period. It is scarcely distinguishable from a bond for the payment of money at a future date. It is *debitum in presenti*, though *solvendum in futuro*.

The children take by virtue of the will, and not by appointment under the power conferred on the trustees. The action of the trustees is not a condition precedent to the vesting of the estate in the devisees, and whatever power they may have to make a difference or distinction on account of casualty or bad conduct, is a discretion subsequent; nor is there anything to indicate that the testator intended to exclude a child from partition by death. The death of two of the children prevents the trustees from making any distinction or difference as to them, and so far as they are concerned there is nothing to evoke the power given.

The condition that the action of the trustees should be approved by the Probate Court is unimportant. The duty imposed upon the court is wholly extra-judicial, and its sanction could impart no validity to the proceedings. If the trustees neglect or refuse to act, or abuse their trust, they are amenable to a court of equity, which will always assert its jurisdiction in such cases.

*Execution of Testamentary Power.*—The will of G. C., Jr., contained the following clauses: "2. I give and bequeath to my dearly beloved wife, Harriet K. Collier, the entire usufruct of my estate, real, personal and mixed, of every description, wherever situated at the time of my death, so that she may enjoy the sole and entire revenue and income thereof during her life. 3. I give to my said wife the absolute right to dispose of one-half of my said property at her decease, by testamentary disposition, as she may deem right and proper." The disposing part of the will of Harriet K. Collier was as follows: "I give to my dear mother, Mary Kearny, the entire property of which I die possessed, wherever situated, real, personal and mixed, of every character and description, including any and all rights acquired by me under the will of my late husband, to enjoy the sole and entire use of the same during her life," &c. *Held*, that here is a direct reference to the power, and in a manner so explicit as to leave no room for doubt as to the intention, and that this was a valid and operative execution of the power.—*Collier's Will*, 287.

## WITNESSES.

1. *Evidence.*—The assignor of a policy of insurance is a competent witness to prove that there was no consideration for the assignment.—*Perry et al. v. Siter et al.*, 37 Mo. 273.—*Bidwell et al. v. St. Louis Floating Dock & Ins. Co.*, 42.
2. *Striking out Answer.*—Under the provisions of the statute, R. C. 1855, p. 1577, § 4, if a party summoned as a witness fails to appear to testify, his answer or petition may be stricken out and judgment rendered accordingly.—*Snyder v. Raab*, 166.
3. *Principal and Surety—Party.*—The principal in a bond, defendant in a suit against whom a judgment by default has been rendered, is a competent witness for his co-defendant, the surety in the bonds.—*State to use, &c. v. Atherton*, 209.

